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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: MAY 02 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an enterprise solutions outsourcing business. It seeks to permanently employ the beneficiary in the United States as "executive vice president of worldwide operations" pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The Director denied the petition on two grounds: (1) the record did not establish that a *bona fide* job offer existed due to the beneficiary's ownership interest in the petitioner and possible family relationship to the majority shareholder, and (2) the petitioner failed to establish its ability to pay the proffered wage of the subject position.

The appeal is properly filed and timely and makes specific allegations of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Case history

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on January 23, 2008. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed at the Department of Labor (DOL) on March 25, 2005[2] (the priority date), and certified by the DOL on July 30, 2007.

The Director denied the petition on January 26, 2009. In his decision the Director noted that the federal income tax returns submitted in support of the petition and a ledger of the petitioner's

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] Effective March 28, 2005, the Form ETA 750 was replaced by the new ETA Form 9089, Application for Permanent Employment Certification.

stockholders identified the beneficiary as a 39 % shareholder. The Director cited the statement of P. N. Subramanian, the petitioner's vice president of human resources, that the petitioner did not disclose this information to the DOL because it was not required on the old Form ETA 750 and was not requested by the DOL. Had it known about the beneficiary's ownership interest in the petitioner, the Director surmised that the DOL might have conducted an inquiry as to whether the executive VP position was a *bona fide* job offer open to qualified U.S. workers. The Director also noted that the stock ledger (dated May 5, 2007) identified the petitioner's majority shareholder, with a 52 % ownership interest, as Arvind Jit Singh, who has the same surname as the petitioner. This information, the Director stated, might also have led to further inquiry by the DOL to determine whether there is a familial relationship between the petitioner's majority shareholder and the beneficiary that could have affected the *bona fides* of the job offer. Because of the petitioner's failure to reveal the information discussed above to the DOL, the Director concluded that the labor certification process was flawed and the petitioner had failed to establish its eligibility for the benefit sought in the instant petition – *i.e.*, the approval of the beneficiary for preference visa status under section 203(b)(2) of the Act.

In his decision the Director also determined that the petitioner had failed to establish its ability to pay the proffered wage of the subject position from the priority date (March 25, 2005 – the date the labor certification application was filed with the DOL) up to the present. The Director indicated that the petitioner's federal income tax returns for the years 2005-2007 did not show that it had sufficient net income or net current assets to cover the proffered wage in those years. In addition, the Director indicated that the documentation of record did not corroborate the petitioner's claim to have paid a salary to the beneficiary during the years in question.

In his appeal brief counsel asserted that the petitioner did not commit fraud or willful misrepresentation or withhold material information during the labor certification process because it correctly filled out the applicable Form ETA 750 and furnished the DOL all required information. Counsel pointed out that the Form ETA 750 contained no questions about whether a beneficiary had an ownership interest in the petitioner or a familial relationship with an owner or part owner of the petitioner. While the new ETA Form 9089 does contain such questions, that form was not yet in effect at the time the petitioner filed the labor certification application underlying the instant petition. Counsel contends that the job offer was *bona fide* because proper recruitment procedures were followed and no other qualified applications were received for the proffered position except for that of the beneficiary. Finally, counsel claims that the documentation of record, including the petitioner's federal income tax returns for 2005, 2006, and 2007, and bank records from those years, establish the petitioner's ability to pay the proffered wage notwithstanding the Director's finding to the contrary.

After reviewing the evidence of record the AAO determined that additional documentation was needed from the petitioner before a decision could be rendered on the appeal. Accordingly, the AAO issued a Request for Evidence (RFE) on January 9, 2012. The petitioner was advised to submit additional evidence of the U.S. equivalency of the beneficiary's two educational credentials from India – a Master of Science degree and a Postgraduate Diploma in Business Management, which the petitioner claims are equivalent to a U.S. master's degree in business administration. The petitioner was also advised to submit additional evidence of its ability to pay the proffered wage from 2005 up to the present – including year-end earnings statements and/or electronic bank records

documenting the beneficiary's compensation in each of the years 2005-2011, as well as the petitioner's federal income tax returns or audited financial statements for 2008, 2009, and 2010. The petitioner responded with a brief from counsel and additional documentation addressing the subjects raised in the RFE.

The issues on appeal are the following:

- Has the petitioner established that a *bona fide* job offer existed during the labor certification process with the DOL?
- Has the petitioner established its ability to pay the proffered wage of the position from the priority date (March 25, 2005) up to the present?
- Do the beneficiary's educational credentials, or education and work experience, make him eligible for classification as an advanced degree professional and qualify him for the proffered position under the terms of the labor certification?

***Bona Fides* of the Job Offer**

Section 212(a)(5)(A)(i) of the Act describes the role of the DOL in the labor certification process:

> In general. - Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to U.S. Citizenship and Immigration Services (USCIS) to determine whether the proffered position and the alien qualify for a specific immigrant classification and whether the alien qualifies for the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS.[3] The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[4] *Id.* at 423. The

[3] The former Immigration and Nationalization Service, now USCIS.

[4] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

> necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[5]

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361. On the Form ETA 750 (Item 22.h.) the employer specifically certifies that the job offer "is clearly open to any qualified U.S. worker." A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

While an occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation, the prospective employee's interest in the corporation is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for

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[5] The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d 1006 (9th Cir. 1983), has stated:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference [visa category] status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986). *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401,406 (Comm. 1986).

In the instant case, counsel concedes in his appeal brief that a familial relationship exists between the beneficiary and [redacted] – who are also co-owners of the petitioner with shares of 39% and 52%, respectively – but asserts that "[j]ust because the beneficiary in this case has blood and financial ties does not, in itself, imply that the position was created for the beneficiary or that a bona fide job offer did not exist that was open to all qualified applicants." Counsel's point is broadly correct, but dodges the salient issue of whether the DOL would have conducted a more rigorous investigation of the labor certification application if the DOL had been apprised of the beneficiary's substantial ownership interest in the petitioner and family tie to the petitioner's majority shareholder. Knowledge of these facts would likely have intensified the DOL's scrutiny of the application to determine whether the position at issue in this proceeding – executive vice president of worldwide operations – was a *bona fide* job offer actually open to qualified U.S. workers. The petitioner could hardly have been unaware that the beneficiary's ties to the petitioner would have been a central focus of the DOL investigation. Accordingly, the petitioner should have informed the DOL of these ties. The burden of proof rests with the petitioner to show that a *bona fide* job offer exists. *See* 20 C.F.R. §§ 626.20(c)(8) and 656.3. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Based on the foregoing analysis, the AAO agrees with the Director that the petitioner has failed to establish that the proffered position in this case was a *bona fide* job offer open to qualified U.S. workers. Accordingly, the petition cannot be approved.

Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(d). The priority date is the date the labor certification application was accepted for processing by the DOL. *Id.*[6] As previously discussed, the priority date in this case is March 25, 2005. The "rate of pay" of the subject position, as stated Part A, Box 12 of the Form ETA 750, is $120,557 per year.

[6] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In this case, the petitioner stated on the Form ETA 750 that the beneficiary began working as its [redacted] office in January 2004. As an employee working outside the United States, the beneficiary has not received Forms W-2, Wage and Tax Statements, or Forms 1099-MISC for any of his years of employment. Counsel indicates that the beneficiary's pay has been recorded on the petitioner's federal income tax returns (Form 1120) – specifically, on Form 5472. [7] The beneficiary is identified in Part III of the form as a "Related Party" located in Singapore. In Part IV of the form – "Monetary Transactions Between Reporting Corporations and Foreign Related Party" – line 16 records "[c]onsideration paid for technical, managerial, engineering, construction, scientific, or like services" performed by the related party.

On the Forms 5472 submitted before the Director's decision in 2008 (as part of the petitioner's federal income tax returns for the years 2005-2007), the consideration recorded in Part IV, line 16, was $97,000 in 2005 (below the proffered wage) and $125,000 in 2007 (above the proffered wage). For 2006, however, two different Forms 5472 were submitted, one of which recorded the consideration in Part IV, line 16, as $52,500 and the other as $117,625 (both of which are below the proffered wage).

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the conflicting figures on the 2006 Form 5472 since the Director's decision. A copy of the petitioner's 2006 federal income tax return was resubmitted with the appeal brief, including the Form 5472 with the figure of $52,500 at Part IV, line 16. In response to the AAO's RFE, however, the petitioner resubmitted the other Form 5472 with the figure of $117,625 at Part IV, line 16. Thus, the petitioner has confirmed the conflict in the record, instead of

[7] The title of Form 5472 is "Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business."

resolving it, and provided no explanation for the two different versions of the Form 5472. Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

The record includes a letter dated March 15, 2007, from Sanjay Asija, the certified public accountant (CPA) who prepared the petitioner's federal income tax return in 2006, stating that the beneficiary was paid an overseas salary of $117,625 in 2006. [redacted] provided no corroborating documentation, however, and did not explain the conflicting salary information on the two versions of Form 5472. The record also includes a letter dated March 24, 2009, from [redacted], vice president [redacted] stating that $135,905.57 was transferred from the petitioner's account in Illinois to the beneficiary's account with DSB Bank in Singapore between March 15, 2006 and March 14, 2007. [redacted] did not distinguish how much was transferred in 2006 and how much in 2007, and he did not specify the purpose(s) of the transfers. As indicated on the Forms 5472 in the record, not all of the money transferred from the petitioner to the beneficiary was categorized as "[c]onsideration received for technical, managerial, engineering, construction, scientific, or like services" performed by the beneficiary. For the reasons discussed above, the letters from [redacted] have little probative value as evidence of the amount of wages the beneficiary received from the petitioner in 2006.

As further evidence of the beneficiary's wages in 2006, photocopied bank statements have been submitted which, according to counsel, represent a partial record of the salary paid to the beneficiary that year. The bank statements indicate that a series of payments were made – some specifically identified as salary, others not – from a bank in New York to the petitioner's DBS Bank account in Singapore, totaling $87,535.69, between February 1, 2006 and December 27, 2006. Aside from the fact that not all of the payments to the beneficiary are identified as salary, the total falls well short of the proffered wage ($120,557 per year). While counsel asserts that the beneficiary's salary in 2006 was $117,625 (just short of the proffered wage), he has offered no explanation for the "missing" bank accounts that could prove his claim. Thus, the bank statements from 2006 do not demonstrate that the petitioner paid the beneficiary anything close to the proffered wage that year.

In response to the AAO's RFE, counsel supplemented the record with copies of the petitioner's federal income tax returns for the years 2008-2010. The Forms 5472, which continued to identify the beneficiary as the "related party," recorded the "consideration paid for technical, managerial, engineering, construction, scientific, or like services" (Part IV, line 16) as $129,000 in 2008 (above the proffered wage), 0 (no entry) in 2009, and $550,867 in 2010 (above the proffered wage). With regard to the "0" recorded in 2009, a notarized letter from the petitioner's [redacted] dated January 31, 2012, states that the beneficiary actually earned $226,875 in 2009, which was recorded on the Form 5472 at Part IV, line 21 ("Other amounts paid"). According to [redacted], the line 21 figure in 2009 consisted of cash payouts to the beneficiary totaling $47,813.07 and a promissory note in the amount of $179,061.93. Even if the AAO accepted these figures as accurate, they confirm that the beneficiary only received $47,813.07 from the petitioner in 2009 – far below the proffered wage of $120,557 per year – because the promissory note was not paid to the beneficiary that year.

Also in response to the AAO, counsel submitted another notarized statement from the petitioner's Manager of Compliance and Controls, likewise dated January 31, 2012, stating that the beneficiary was paid $174,518 for his services "related to international activities" in 2011.

In summation, the Forms 5472 in the record show that the beneficiary's compensation from the petitioner for services rendered exceeded the proffered wage ($120,557 per year) in 2007 ($125,000), 2008 ($129,000), and 2010 ($550,867), but not in 2005 ($97,000), 2006 (conflicting figures, both below the proffered wage), or 2009 (0). With regard to 2011, the AAO accepts the notarized statement of the petitioner's Manager of Compliance and Control as persuasive evidence that the beneficiary was paid $174,518 last year – more than the proffered wage.

In accordance with the foregoing analysis, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its actual compensation to the beneficiary over the years. The evidence of record indicates that the beneficiary's pay was below the proffered wage in 2005, 2006, and 2009.

As an alternate means of determining the petitioner's ability to pay the proffered wage in 2005, 2006, and 2009, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost

> of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

The petitioner's federal income tax returns record its net income on page 1, line 28, of the Form 1120. For the years 2005, 2006, and 2009 the petitioner's net income was $123,079 (2005), $6,042 (2006), and -$217,299 (2009). Since net income exceeded the proffered wage ($120,557) in 2005, the petitioner has established its ability to pay the proffered wage that year. For 2006, net income was far below the proffered wage. If the modest net income of $6,042 were added to the $117,625 counsel claims the beneficiary was paid that year (on the latest Form 5472 submission), the sum would exceed the proffered wage. However, the petitioner has not resolved the conflicting figures on prior Form 5472 submissions indicating that the beneficiary was only paid only $52,500 in 2006. Thus, the record does not show that the petitioner's net income in 2006 combined with its actual pay to the beneficiary matched or exceeded the proffered wage in 2006. As for 2009, the petitioner incurred a substantial net loss that year.

Based on its net income, therefore, the petitioner has established its ability to pay the proffered wage in 2005, but not in 2006 or 2009.

As another alternate means of determining the petitioner's ability to pay the proffered wage in 2006 and 2009, USCIS will review the petitioner's net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

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[8] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

With regard to 2009, the petitioner's federal income tax return shows that its current assets ($1,032,896) were greater than its current liabilities ($850,676), resulting in net current assets that year of $182,220. Since this figure exceeded the proffered wage ($120,577), the petitioner has established its ability to pay the proffered wage based on its net current assets in 2009.

As for 2006, the petitioner's federal income tax return shows that its current assets ($541,400) were outweighed by its current liabilities ($628,749), resulting in net current liabilities that year of -$87,349. Counsel points out that line 18 of Schedule L lists $462,641 worth of "other current liabilities," of which $165,669 consisted of loans from the petitioner's shareholders. According to counsel, these loans could have been recorded on line 21 of Schedule L ("Other liabilities") because they were not intended to be paid back within one year and thus were not really current liabilities. Subtracting $165,669 from current liabilities would turn the net liabilities of ($87,349) into net current assets of $78,320. Adding this figure to the beneficiary's actual pay from the petitioner that year (even if the AAO took the lower of the two amounts indicated on the conflicting Form 5472s – $52,500) would yield a sum in excess of the proffered wage. Counsel has not provided a convincing rationale, however, for ignoring the shareholder loans listed by the petitioner as current liabilities. While he claims that the petitioner had no obligation to repay them within a year, no documentary evidence thereof has been submitted. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the petitioner has not demonstrated its ability to pay the proffered wage based on net current assets in 2006.

Thus, the petitioner has established its ability to pay the proffered wage based on its net current assets in 2009, but not in 2006.

For the year 2006, therefore, the petitioner has not established its ability to pay the proffered wage of $120,557 on the basis of any of the three methods– the salary it actually paid to the beneficiary, its net income, or its net current assets. *See* 8 C.F.R. § 204.5(g)(2).

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage in 2006. *See Matter of Sonegawa,* 12 I&N Dec. 612.[9] USCIS may, at its

[9] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the record is unclear as to when the petitioner was established. On the Form I-140 petition it filed in January 2008 the petitioner stated that it had five employees in the United States and 83 employees worldwide. As indicated in the federal income tax returns for the years 2005-2010, the petitioner's gross receipts totaled $1,719,471 in 2005, $2,034,032 in 2006, $3,168,636 in 2007, $4,521,053 in 2008, $4,824,201 in 2009, and $4,712,944 in 2010. The year for which the petitioner's ability to pay is in doubt – 2006 – was early in that cycle, when gross receipts were relatively modest prior to the substantial jumps of 2007 and 2008. There is no documentation in the record relating to the petitioner's business before 2005. Thus, there is no historical evidence of the petitioner's business success over an extended period of time before 2006. Indeed, there is no evidence the petitioner was even in business prior to March 2003, when the first round of stock was issued (according to the stock ledger dated May 5, 2007). Considering this paucity of evidence, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage to the beneficiary in 2006.

For all of the reasons discussed in this decision, the petitioner has failed to establish its ability to pay the proffered wage of $120,577 in 2006. For this reason as well, the petition cannot be approved.

Educational and Experience Requirements

To be eligible for approval as an advanced degree professional, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

1. Is the Beneficiary Eligible for the Classification Sought?

As previously discussed, the Form ETA 750 in this case is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act, 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977).[10] This decision involved a petition filed under 8 U.S.C. §1153(a)(3) of the Act, as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 Act added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference (advanced degree professional) immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's

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[10] In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

> degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *See Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[11] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus five years of progressive experience in the specialty). *See* 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).[12]

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[11] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

[12] *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

The documentation of record shows that the beneficiary earned the following educational credentials in India:

- a Master of Science in Physics from the Birla Institute of Technology & Science (Birla Institute) in Pilani on April 14, 1981, after the completion of a five-year degree program.

- A Postgraduate Diploma (PGD) in Business Management from Xavier Labour Relations Institute (XLRI) in Jamshedpur on March 4, 1984, after the completion of a two-year program.

According to Education Evaluators International Inc. (EEI) of Los Alamitos, California, in an evaluation dated March 9, 2005 that was submitted with the petition, the beneficiary's Master of Science degree in India is equivalent to a Bachelor of Science degree in the field of physics from a regionally accredited U.S. college or university, and his Postgraduate Diploma in Business Management, whose minimum entry requirement was a three-year bachelor's degree, is equivalent to a Master of Business Administration (MBA) from a regionally accredited university in the United States.

Also submitted with the petition were letters from previous employers documenting the beneficiary's work experience in a succession of business management positions in India, the United Arab Emirates, and Singapore over a 19-year period from 1984 to 2003.

In its RFE on January 9, 2012, the AAO referred to the EEI evaluation and expressed doubt that the beneficiary's education in India, culminating in a PGD in Business Management, was equivalent to an MBA in the United States. The AAO cited the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which rates an Indian Master of Science degree as comparable to a bachelor of science degree in the United States, and an Indian PGD following a three-year bachelor's degree as also comparable to a bachelor's degree in the United States. In short, EDGE did not indicate that the beneficiary's education in India – specifically, his PGD in Business Management – was comparable to a U.S. master's degree in business administration. The petitioner was given 45 days to respond to the RFE and submit additional documentation. It did so on February 23, 2012.

In his response to the RFE counsel asserts that the beneficiary's PGD in Business Management from XLRI is equivalent to an MBA in the United States. The AAO does not agree.

As previously mentioned, the AAO has consulted the database (EDGE) created by AACRAO as a resource to evaluate the U.S. equivalency of foreign degrees. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/about/. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://aacraoedge.aacrao.org/register/. Authors for EDGE are not merely expressing their personal

opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[13] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[14]

According to EDGE, a Master of Science degree in India is awarded upon completion of 1.5 to 2.0 years of study beyond the three-year bachelor's degree and is comparable to a bachelor's degree in the United States. In line with the EDGE evaluation, therefore, the AAO determines that the beneficiary's Master of Science in Physics from the Birla Institute is comparable to a U.S. bachelor of science degree in the field of physics.

As for Post Graduate Diplomas in India, EDGE states generally that a PGD is awarded upon completion of one year of study (though there are also some two-year PGD programs) beyond the two- or three-year bachelor's degree. A PGD following a three-year bachelor's degree is comparable to a U.S. bachelor's degree.

Counsel points out that the EDGE "credential description" of a PGD states that it is a one-year study program, and that no mention is made of a two-year PGD until the end of the "author notes." In counsel's view, therefore, the EDGE "credential advice" – rating a PGD following a three-year bachelor's degree as comparable to a U.S. bachelor's degree – is only applicable to a one-year PGD, not a two-year PGD (like the beneficiary's in this case). Counsel also notes that the "credential advice" in EDGE does not address the U.S. equivalency of a two-year PGD that follows a U.S.-equivalent bachelor's degree in India (like the beneficiary's five-year Master of Science degree). Counsel concludes that the EDGE equivalency is inapplicable in this case.

While granting that EDGE does not cover the instant situation with pinpoint clarity, the AAO also finds no basis in its description of the Indian PGD to find that the beneficiary's PGD is comparable to a U.S. master's degree. EDGE rates a PGD following a three-year bachelor's degree as comparable to a U.S. bachelor's degree. While the evaluation focuses on one-year PGDs, the two-

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[13] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

[14] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano,* 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

year PGD is also mentioned in the notes with no indication that one additional year in a PGD program would turn a U.S. bachelor's degree equivalency into a U.S. master's degree equivalency. A PGD of two years duration (as opposed to one year) might enhance its U.S. equivalency somewhat, but still be short of a master's degree equivalency. Moreover, the fact that the beneficiary's preceding degree exceeded three years in length and is called a Master of Science in India is inconsequential in evaluating the U.S. equivalency of the PGD that followed. As the EDGE evaluation indicates, a two- or three-year bachelor's degree is all that's required for entry into a PGD program. The fact that a PGD program participant may have exceeded the minimum entry requirement with a four-year bachelor's degree, or a five-year degree entitled Master of Science like the beneficiary's in this case, does not enhance the U.S. equivalency of his PGD, especially when the PGD is in an entirely different field such as business management. Even if the beneficiary's PGD is equivalent to an master's degree in India, as the EEI evaluation claims, an Indian master's degree is generally comparable to a U.S. bachelor's degree.

The record includes reports from two academic credentials evaluation services – one from the aforementioned EEI and the other from Morningside Evaluations and Consulting (Morningside) of New York City (the latter submitted in response to the AAO's RFE). Both evaluations are flawed. While the AAO concurs with EEI's assessment of the beneficiary's Master of Science degree in the field of physics from the Birla Institute as equivalent, or at least comparable, to a bachelor's degree in that field from a U.S. college or university, it does not concur with its assessment of the beneficiary's PGD from XLRI as equivalent to an MBA in the United States. EEI offers no substantive analysis of the PGD program and its comparison with U.S. MBA programs. It states that the Birla Institute's PGD is recognized by the Association of Indian Universities (AIU) as equivalent to a master's degree from an Indian university. Even if true, this equivalency is irrelevant in the instant proceeding, which requires that the beneficiary's educational credential be equivalent to a U.S. master's degree, not an Indian master's degree. As for the Morningside evaluation, it completely misses the mark because it only references the beneficiary's five-year Master of Science degree, while ignoring his two-year PGD in Business Management. Even if the AAO concurred with Morningside's conclusion (which it does not) that the Master of Science in Physics from the Birla Institute is equivalent to a U.S. master's degree in the field, the degree is not in the field of business management, as required in the instant proceeding. Thus, Morningside's equivalency evaluation is useless for the purposes of this petition.

Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For the reasons discussed above, the AAO determines that the EEI evaluation has little probative value, and the Morningside evaluation none whatsoever, as evidence that the beneficiary's PGD in Business Management from XLRI in India is a foreign equivalent degree to an MBA in the United States.

In addition to the EEI and Morningside evaluations, the petitioner submitted two letters from academics in the field of business management. One is from a Professor [redacted], dated February 20, 2012, who claims that a two-year PGD in Business Management from XLRI – based on his knowledge of the institution, the curriculum of

the program, and the successful careers of XLRI graduates in business and academia – is equivalent to a two-year MBA from any accredited business school in the United States. Aside from these broad assertions, [redacted] provides no substantive analysis of XLRI's two-year PGD program, or why it rates as equivalent to a U.S. MBA. The other letter is from [redacted] dated February 21, 2012, who likewise claims that SLRI's two-year PGD in Business Management is equivalent to a two-year MBA in the United States. [redacted] "evaluation" is nothing more than a conclusory statement devoid of substantive analysis or factual support.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. As in the case of reports from credential evaluation services, however, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International. See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). For the reasons discussed above, the AAO determines that the letters from [redacted] and [redacted] have little or no probative value as evidence that the beneficiary's PGD in Business Management from XLRI in India is a foreign equivalent degree to an MBA in the United States.

Counsel asserts that some U.S. schools accept three-year bachelor's degrees for entry into their two-year MBA programs, citing MIT (Massachusetts Institute of Technology) in particular. The website of MIT's Sloan School of Management (Sloan) appears to confirm counsel's assertion with respect to that school. There is no evidence in the record, however, that a two-year PGD from XLRI is recognized as a master's level program anywhere outside of India. The fact that one can earn an MBA at Sloan after five years of post-secondary study does not mean that a credential in the field of business management awarded by XLRI in India after a comparable period of post-secondary study is necessarily equivalent to an MBA from Sloan or any other accredited U.S. business school.

For all of the reasons discussed above, the petitioner has failed to establish that the beneficiary has a foreign equivalent degree to a U.S. master's degree in business administration.

Nevertheless, the AAO determines that the beneficiary could be entitled to classification as an advanced degree professional under section 203(b)(2) of the Act because he satisfies the alternative requirements of an "advanced degree" set forth in 8 C.F.R. § 204.5(k)(2) – namely, a foreign equivalent degree to a bachelor's degree and five years of progressive experience. The question remaining, however, is whether the beneficiary meets the requirements of the labor certification.

2. Is the Beneficiary Qualified for the Job Offered?

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference

> [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found in Form ETA 750, Part A. This part of the application – "Offer of Employment" – describes the terms and conditions of the job offered. It is important that the application be read as a whole.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this case, the petitioner described the job duties of the proffered position – Executive Vice President of Worldwide Operations – in Part A, box 13 of the ETA Form 750:

> Responsible for managing business operations and supply chain for service delivery of outsourced business process support to customers. Duties include developing and overseeing qualification and quality control of international delivery centers; negotiating contracts, terms and prices with delivery centers; supporting customer and delivery center relationships from pre-sales through implementation; conducting service quality reviews with customers; managing profitability and costing customer

accounts; overseeing finance and accounting for company operations, including payroll, receivables, payables, banking, government and regulatory submissions and audits.

The petitioner specified the educational and experience requirements for the position in Part A, Boxes 14 and 15, of the ETA Form 750:

- The minimum educational requirement is 6 years of college and a master's degree or "foreign equivalent" in business administration.
- The minimum experience requirement is 15 years in the "job offered" or in a related occupation – specifically, business management.
- "Other Special Requirements" are listed as follows:
  - 5 years experience managing international business operations involving Asia and India.
  - 5 years experience at the director or general manager level.
  - Experience establishing and managing vendor relationships or outsourcing business models.
  - Familiarity with commercial and business practices in multiple countries in the region (Asia/India).
  - General management experience including profit-and-loss responsibility.
  - Experience establishing and managing vendor relationships and contract personnel
  - Proven track record of customer-facing roles required for customer support.

Based on the letters from previous employers, the AAO determines that the beneficiary satisfies the experience requirement and other special requirements set forth on the labor certification. The AAO also finds that the beneficiary satisfies the requirement of six years of college education.

As previously discussed, however, the beneficiary does not have a U.S. master's degree in business administration, or a foreign equivalent degree to a U.S. MBA. Therefore, he does not meet the minimum educational degree requirement of the labor certification to qualify for the proffered position. For this reason as well, the petition cannot be approved.

Conclusion

The petition is deniable on three grounds:

1. The petitioner has failed to establish that the proffered position was a *bona fide* job offer open to qualified U.S. workers.
2. The petitioner has failed to establish its ability to pay the proffered wage in 2006.

3. The petitioner has failed to establish that the beneficiary has the requisite educational degree specified on the labor certification – a master's degree in business administration or a foreign equivalent degree – to qualify for the proffered position.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.